THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Public Service Commission Docket Nos. 2018-319-E & 2018-318-E

Duke Energy Carolinas, LLC ..... Appellant-Respondent,

v.

The South Carolina Office of Regulatory Staff, Hasala Dharmawardena, CMC Recycling, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Inc., the South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc. ..... Respondents,

of whom,

South Carolina Energy Users Committee is ..... Respondent-Appellant.

Duke Energy Progress, LLC ..... Appellant,

v.

The South Carolina Office of Regulatory Staff, Nucor Steel-South Carolina, Cypress Creek Renewables, LLC, SC Department of Consumer Affairs, Sierra Club, South Carolina Coastal Conservation League, South Carolina Energy Users Committee, South Carolina Solar Business Alliance, Incorporated, The South Carolina State Conference of the National Association for the Advancement of Colored People, Upstate Forever, Vote Solar, and Walmart, Inc., .. Respondents.

RESPONDENT'S BRIEF OF DUKE ENERGY CAROLINAS, LLC

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STATEMENT OF ISSUES ON APPEAL

1. Did the Public Service Commission correctly allow Duke Energy Carolinas, LLC to recover its prudently incurred preconstruction costs associated with the Lee Nuclear Station?

STATEMENT OF THE CASE[1]

The South Carolina Energy Users Committee ("SCEUC") has appealed the portions of the orders of the Public Service Commission of South Carolina ("PSC" or "Commission") allowing Duke Energy Carolinas, LLC ("DEC") to recover certain preconstruction costs attributable to the Lee Nuclear Station ("Lee Site"). These costs were requested as part of DEC's 2018 rate case.

On November 8, 2018, DEC filed an Application (the "DEC Application") with the PSC requesting authority to adjust and increase its electric rates, charges, and tariffs effective June 1, 2019. (R. at 3979-4008). Among other things, DEC sought to recover "the balance of development costs associated with the cancellation of the Lee Nuclear Project" totaling $125 million on a South Carolina retail basis to be recovered over the next twelve years (*Id.* at ¶¶ 14, 17). SCEUC petitioned to intervene on January 10, 2019, and the petition was granted by directive on January 30, 2019. (R. at 4009-14, 4015). The Commission heard the matter from March 21-27, 2019.

The Commission ruled in its order of May 21, 2019 that DEC could recover its prudently incurred preconstruction costs for the Lee Site. (R. at 3910, 3924-25). SCEUC sought rehearing (R. at 4036-46), and the Commission denied the petition by order dated October 18, 2019 (R. at 3958).

[1] DEC incorporates by reference its statements of the case and facts from its Appellant's brief.

FACTS

I. DEC identified the need for additional electrical generation sources, identified the Lee Site as a potential location for two nuclear reactors, and successfully pursued combined operating and construction licenses for those reactors.

In the 2005 timeframe, DEC identified the need for additional generation capacity. (R. at 4337:14-40:19).[2] At that time, the energy market was markedly different than it is today. Planners were faced with a volatile natural gas market and growing concerns over the regulatory landscape surrounding coal emissions. (*Id.*). In addition, there was public support and a friendly legislative climate for nuclear power as a possible low emission, least-cost alternative. (*Id.*; R. at 4349:1-50:11). As a result, DEC began exploring adding nuclear capacity and announced the selection of the Lee Site for possible nuclear expansion in 2006. (*Id.*).

In 2007, DEC submitted an application to the Nuclear Regulatory Commission ("NRC") for combined operating and construction licenses ("COL") for two nuclear reactors at the Lee Site. (R. at 4347:1-4). The COL was granted on December 19, 2016, and it permits DEC to construct and operate the units for forty years following a determination by the NRC that the requirements of 10 C.F.R. § 52.103(g) are met. (R. at 4347:6-48:6).

The COL remains in place, and DEC is not required to begin construction by any particular date. (*Id.*). At this time, DEC has abandoned the project but continues "investing those costs necessary to maintain the COL and site at a minimum level." (R. at 4348:8-18, 4362:4-64:17). The COL retains value even following the current abandonment of the project. (R. at 4414:5-4417:3). If and when DEC decides additional nuclear capacity is desirable, the COL means that

[2] This history and background with respect to the Lee Site is also reflected in PSC Order No. 2008-417 in Docket No. 2007-440-E (2008).

there will be significantly reduced lead-time necessary to make that goal a reality. (R. at 4417:6-14).

II. DEC prudently incurred and sought recovery for the preconstruction costs at issue.

In 2007, DEC sought and was awarded a project development order ("PDO") and pre-authorization under the Base Load Review Act ("BLRA"), S.C. Code Ann. § 58-33-225, for the South Carolina retail allocable share of $230 million in preconstruction costs through December 31, 2009.[3] PSC Order No. 2008-417 in Docket No. 2007-440-E (2008). DEC sought pre-authorization for additional preconstruction costs in 2011 ("2011 case"), again under the BLRA. *See* PSC Order No. 2011-454 in Docket No. 2011-20-E (2011).

In the 2011 case, DEC was able to come to an agreement with SCEUC, among others, that it was prudent for DEC to incur additional preconstruction costs between January 1, 2011 and June 30, 2012 of $120 million, including allowance for funds used during construction ("AFUDC") on a South Carolina retail basis "to ensure that the Lee Nuclear Station remains an option to serve customer needs in the 2021 timeframe." *Id.* at 15-18. This agreement and an ensuing PSC order were conditioned on DEC agreeing to limit its costs to "those costs absolutely necessary" to maintain project viability. As part of that agreement and order, DEC regularly updated the PSC as to (1) whether North Carolina had enacted legislation similar to the BLRA; (2) preconstruction costs, including AFUDC; and (3) the status of DEC efforts to acquire a share of the then under construction V.C. Summer Project. (R. at 4355:21-56:7). The order expressly provided, "[f]or ratemaking purposes, the issuance of this order does not constitute approval of the reasonableness or prudence of specific project development activities or recoverability of specific items of

[3] The South Carolina retail allocation is approximately 24% of this total. (*See* R. at 4232:20-23).

costs[.]" PSC Order 2011-454 at 17. Accordingly, "[t]he specific details of the costs have been routinely reported to the [PSC]" by DEC since 2011. (R. at 4344:11-17).

In its 2018 rate case, DEC sought the actual recovery of its preconstruction costs for the Lee Site for the first time. This request was made in conjunction with a regular rate case and was not made pursuant to the BLRA. (R. at 3979-4008). In addition to general testimony regarding the accounting for the requested expenses, DEC presented two witnesses to testify to the prudence of these expenditures and the value of the COL, (1) Christopher Fallon, DEC Vice President of Nuclear Development 2012-2016 (R. at 4342:5-8), and (2) Dr. Nils Diaz, of ND2 Group, LLC and former member (1996-2006) and chair (2003-2006) of the NRC (R. at 4382:4-83:9). (R. at 4333:12-4470:16).

The North Carolina share of these costs has been determined to be reasonable and prudent by the North Carolina Utilities Commission ("NCUC") Public Staff "with little exception," and the NCUC allowed the recovery of the North Carolina retail allocated share (approximately 67% of the total), including the AFUDC component. (R. at 4374:14-22, 5120-54, 5611, 5741-54). The South Carolina Office of Regulatory Staff ("ORS") agreed that these expenses were reasonable, again including the AFUDC component. (R. at 5071:3-72:8). No rebuttal witnesses were offered, "no other party to this proceeding presented testimony in opposition to [DEC's] recovery of its costs for the Lee Nuclear Project" (R. at 3925), and SCEUC does not challenge the prudency of these expenses (R. at 4470:10-16).

STANDARD OF REVIEW

As set forth in S.C. Code Ann. § 1-23-380(5), "[t]he court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." On appeal,

> the court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id.

ARGUMENTS

SCEUC has argued that the Commission erred in allowing recovery of the preconstruction costs attributable to the Lee Site as a matter of law due to the repeal of the BLRA. It has not challenged the evidence supporting the Commission's determination or asserted that the Commission's decision was arbitrary or capricious or characterized by an abuse of discretion. Nor has it challenged the Commission's determination that the preconstruction costs for the Lee Site, including AFUDC, were reasonably and prudently incurred. This determination by the Commission was consistent with the recommendation of ORS and the findings of the NCUC in allowing the recovery of approximately 67% of the total costs as the North Carolina retail allocated share.

SCEUC urges this Court to read the BLRA in a vacuum, completely divorced from the other statutory provisions and precedent relating to rate setting. This is inconsistent with the plain language of the statutes, PSC precedent, and the intent of the General Assembly.

With respect to rates, the legislature has directed that "[e]very rate made, demanded or received by any electrical utility [] shall be just and reasonable." S.C. Code Ann. § 58-27-810. To that end, DEC in its Application sought recovery for the first time of the South Carolina allocable portion of the preconstruction costs for the Lee Site under S.C. Code Ann. §§ 58-27-820 and -870. DEC did not seek recovery under the BLRA, nor has it recovered any costs associated with this project under the BLRA.

I. The BLRA was not an exclusive means of recovery for base load projects, and its repeal does not render the Lee Site preconstruction costs unrecoverable.

By way of background, the BLRA provided utilities with a means of prospectively seeking a prudency determination and recovery of certain costs rather than requiring the utility to prove prudency and entitlement to recovery after those costs were incurred in a general rate case. The BLRA provided two new and additional avenues by which a utility could seek recovery of its costs for base load projects. First, if the utility decided to go forward with construction of the project, the utility could seek a base load review order. *See* S.C. Code Ann. § 58-33-270. A base load review order would allow the utility to recover its costs through either revised rate filings or general rate proceedings. S.C. Code Ann. §§ 58-33-275(C), 58-33-280(B) & (J)(3). South Carolina Electric & Gas Company ("SCE&G"), the co-owner of the V.C. Summer project, pursued this course.

Second, a utility with a PDO under the BLRA could decline to move forward and abandon the project. In such a case, the utility would collect its abandonment costs, including carrying costs. *See* S.C. Code Ann. § 58-33-225(G). The BLRA's provision for recovery of preconstruction costs that are the subject of a PDO were distinct from those provisions relating to the recovery of costs to construct a plant that is the subject of a base load review order.

Separate from the BLRA, PSC precedent allowed the recovery of abandonment costs through general rate cases. *See, e.g.*, PSC Order No 83-92 in Docket No 82-50-E (1983) at 22-23, 46-47 (approving cost recovery for an abandoned nuclear station and two additional generating units at an existing site). Neither the passage nor repeal of the BLRA has abrogated this independent avenue of recovery for a utility's abandonment costs.

The BLRA provided that a utility could seek initial or additional PDOs at its option. There is no language in the BLRA to support SCEUC's contention that the BLRA became the exclusive avenue for recovery of the preconstruction costs for the Lee Site. The plain language of the BLRA makes it clear that filing a project development application is permissive and is not a prerequisite to the recovery of project development costs. *See* S.C. Code Ann. § 58-33-225(B) ("At any time before the filing of an application or a combined application under this act related to a specific plant, a utility may file a project development application with the commission and the office of regulatory staff."). The BLRA's use of the term "may" means that filing a project development application under the BLRA is permissive and not mandatory.

Furthermore, the BLRA indicates that the project development application may be filed "[a]t any time before the filing of an application or a combined application[.]" *Id.* While the plain language of the BLRA requires the filing date of a project development application to precede a utility's base load review application or combined application, the statute contains no requirement that the project development application be filed prior to incurring project development costs.

Following an initial PDO, the BLRA states that "a utility may file an amended project development application seeking a determination of the prudency of the utility's decision to continue to incur preconstruction costs[.]" S.C. Code Ann. § 58-33-225(I). Nothing in the BLRA states or implies that once a PDO is obtained only those funds specifically pre-authorized by the

PDO are recoverable, and nothing in the BLRA prevents a utility from seeking to recover costs beyond those approved in a PDO, as DEC did here, by demonstrating the reasonableness and prudence of the decision to incur those additional costs under S.C. Code Ann. §§ 58-27-820 and -870. DEC made the required showing with respect to the preconstruction costs for the Lee Site, ORS concurred, and SCEUC offered no evidence to contradict that showing. Based on this substantial evidence and the applicable statutes, the Commission approved the request.

In 2018, after the very public disintegration of the V.C. Summer project, the General Assembly passed Act 258, amending the BLRA and providing for its ultimate repeal "upon the conclusion of litigation concerning the abandonment of V.C. Summer Units 2 and 3." Act No. 258, 2018 S.C. Acts 1872 ("Act 258"). Act 258 further provided that the Commission was not to accept any new BLRA applications or consider any requests under the BLRA "other than in a docket currently pending[.]"

In considering Act 258,

> Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below. The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature. When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. In interpreting a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Further, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.

In re Estate of Gurnham, 407 S.C. 194, 203–04, 754 S.E.2d 875, 879 (2014) (citations and quotations omitted). In addition, "[t]here is a presumption that the legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects." *Lexington Law Firm v. S.C. Dep't of Consumer Affairs*, 382 S.C. 580, 587, 677 S.E.2d 591, 594 (2009). Thus, Act 258 must be read according to its plain

language and in conjunction with the other statutes relating to rate setting and PSC precedent. Under that analysis, the Commission correctly provided for the recovery of the Lee Site preconstruction costs.

Act 258 does not state that any costs relating to previously issued PDOs could not be recovered in a general rate case. Nor does it make any reference to DEC or the Lee Site. Nor does it make any mention of the Commission's abandoned plant precedent, which allows the recovery of costs.

Instead, the focus of the General Assembly in passing Act 258 was the failure of the V.C. Summer project. If the legislature had intended to foreclose recovery of all nuclear preconstruction costs, including under the Commission's existing precedent, the legislature could have formulated direct language to this effect. To the contrary, Act 258 allowed SCE&G to recover substantial amounts of its investment in the V.C. Summer project, far in excess of the amount DEC sought to recover for the Lee Site, further undermining SCEUC's position that Act 258 forecloses recovery for nuclear project abandonment costs.

The legislative debate surrounding Act 258 also contradicts SCEUC's formulation of the General Assembly's intent regarding the Lee Site.[4] During the Senate's discussion of a proposed amendment to H. 4375 (which ultimately became a part of Act 258), Senator Massey responded to questions from other senators regarding the proposed amendments, explaining with regard to the Lee Site:

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[4] As argued above, the BLRA is permissive and is not an exclusive means of cost recovery for base load projects. Nothing in Act 258 changes that. As such, the language of the BLRA and Act 258 control. *Smith v. Tiffany*, 419 S.C. 548, 555, 799 S.E.2d 479, 483 (2017) ("If a statute is clear and explicit in its language, then there is no need to resort to statutory interpretation or legislative intent to determine its meaning." (quoting *Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 401, 175 S.E.2d 805, 817 (1970)). However, to the extent SCEUC has argued for a different construction; DEC's argument is also consistent with the legislative history.

> There are other statutory provisions they could use to recover those costs. They just have to prove that it was prudent to do those things. Whereas, as the senator from Charleston was talking about, it's a whole lot easier under the Base Load Review Act. It's basically on autopilot. So there would be an additional avenue there if Duke wanted to do that, but this would prevent Duke from filing an application under the Base Load Review Act because we are cutting off applications now.

See http://www.scstatehouse.gov/video/archives.php, May 9, 2018, Senate Part 2 recording beginning at approximately 3:38:50. In response to a question regarding whether DEC had recovered any amounts to date from customers for the Lee Site, Senator Massey explained, "There is another avenue that Duke could pursue under other portions in the code to do that. It's just kind of a different process, but there is a process available if they wanted to pursue that." *See id.* beginning at approximately 3:43:10. Considering these statements in the broader context of Act 258, the legislative intent in Act 258 was not to foreclose recovery by DEC of its investment in the Lee Site.

Moreover, such a construction would be confiscatory and violative of due process. In construing an act of the General Assembly, "all reasonable doubt must be resolved in favor of the constitutionality of the act. If a constitutional construction of a statute is possible, that construction should be followed in lieu of an unconstitutional construction." *Crow v. McAlpine*, 277 S.C. 240, 242, 285 S.E.2d 355, 356 (1981). As a basic premise, if the rates established by the PSC are too low to "afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989) (acknowledging state flexibility in ratemaking methodology in the context of the applicable Pennsylvania statute while acknowledging that there are constitutional limits to the impact of rate orders); *see also* U.S. Const. amend. V; S.C. Const. art. I, § 13(A). As stated by the United States Supreme Court nearly a century ago:

> A public utility is entitled to such rates as will permit it to earn a return upon the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties . . . . The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit, and enable it to raise the money necessary for the proper discharge of its public duties.

Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va., 262 U.S. 679, 692 (1923); *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944). Together, *Hope* and *Bluefield* provide "the basic principles of utility rate regulation" in South Carolina. *S. Bell Tel. & Tel. Co. v. Pub. Serv. Comm'n*, 270 S.C. 590, 595, 244 S.E.2d 278, 281 (1978). Any construction of Act 258 that would render these costs wholly unrecoverable would give rise to fundamental due process violations, which would render the act unconstitutional. The correct and better reading of Act 258, and the one that does not have constitutional implications, is that it was intended to address the V.C. Summer crisis, to preclude new BLRA applications, and to provide for the repeal of the BLRA, not that it was intended to displace the general statutes regarding rates and prior PSC precedent.

Here, DEC did not attempt to invoke the BLRA, but rather relied on PSC precedent and the general rate statutes to establish prudency and recover its already incurred preconstruction costs with respect to the Lee Site. The ORS conceded generally that the requested costs were prudent, and the Commission approved the recovery of those costs.

II. DEC's request to recover its reasonable and prudent preconstruction costs for the Lee Site is not barred by waiver, estoppel, or the election of remedies.

SCEUC takes the position that DEC's rate request is somehow precluded by the litigation concept of election of remedies.[5] This doctrine is simply inapplicable in this context.

> The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury. Its purpose is to prevent double redress for a single wrong. Use of the doctrine is limited to cases where a double recovery by the plaintiff is threatened.

Cowart v. Poore, 337 S.C. 359, 364, 523 S.E.2d 182, 185 (Ct. App. 1999) (citations omitted). Here, DEC is not seeking a double recovery. It has not recovered any costs for the Lee Site under the BLRA. Instead, it is seeking to recover its reasonable and prudent costs associated with the Lee Site consistent with PSC precedent and the statutory scheme provided by the General Assembly (S.C Code Ann. §§ 58-27-820 and -870). DEC has not previously sought the recovery of these costs, and customers have not previously paid these costs.

Nor are the equitable doctrines of equitable estoppel, judicial estoppel, or waiver applicable here.[6] SCEUC has not specified the specific nature of any waiver and/or estoppel, and each of

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[5] DEC notes that SCEUC raises the election of remedies doctrine for the first time on appeal. Although SCEUC made some general references to an "election" by DEC, it did not make any arguments specific to the election of remedies doctrine in its brief before the PSC or in its petition for rehearing. (R. at 4016-21, 4036-46). As such, any arguments relating to this doctrine are not preserved for review by this Court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 734 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

[6] SCEUC has not articulated its arguments with respect to estoppel and/ or waiver beyond the mere use of the words. It has never attempted to articulate an evidentiary basis for this argument, nor does it do so in its Appellant's brief. As such, any argument on this point is either unpreserved or abandoned. *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d at 734; *Shealy v. Doe*, 370 S.C. 194, 205–06, 634 S.E.2d 45, 51 (Ct. App. 2006) ("[W]hen an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal."). SCEUC cannot correct this failure in its reply brief. *Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("Additionally, even though [Appellant] more fully addressed the issue in its reply brief, an argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

these defenses has different elements and requires an evidentiary showing.

Under South Carolina law,

> A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted, possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.

Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 388–89 (1992).

"Equitable estoppel is used defensively only and is grounded on a party's misstatement of existing fact; the essence of equitable estoppel is that the party invoking it was misled to his injury." *Thomerson v. DeVito,* Op. No. 27972 (S.C. Supreme Court filed May 27, 2020) (Shearouse Adv. Sh. No. 21 at 17) (citing *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017); *Janasik*, 307 S.C. at 345, 415 S.E.2d at 388; 31 C.J.S. Estoppel and Waiver § 76 (2008)). The essential elements of estoppel are divided between the estopped party and the party claiming estoppel. *S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993). As to the estopped party, the essential elements are:

(1) conduct amounting to a concealment of material facts, or conduct calculated to convey the impression that the facts are otherwise than, and inconsistent with, the party's subsequent assertions;
(2) intention or expectation that such conduct be acted upon by the other party; and
(3) actual or constructive knowledge of the real facts.

Id. As to the party claiming estoppel, the essential elements are:

(1) lack of knowledge or the means of acquiring, with reasonable diligence, knowledge of the true facts;
(2) reasonable reliance on the other party's conduct; and
(3) a prejudicial change in position.

Id. The reliance by the party claiming estoppel must be reasonable, and it must proceed in good faith. *Masonic Temple v. Ebert*, 199 S.C. 5, 17, 18 S.E.2d 584, 589 (1942).

The elements of judicial estoppel in South Carolina are as follow:

> (1) two inconsistent positions taken by the same party or parties in privity with one another;
> (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
> (3) the party taking the position must have been successful in maintaining that position and have received some benefit;
> (4) the inconsistency must be part of an intentional effort to mislead the court; and
> (5) the two positions must be totally inconsistent.

Cothran v. Brown, 357 S.C. 210, 215–216, 592 S.E.2d 629, 632 (2004).

SCEUC did not present any evidence as to these elements before the PSC, nor has it made any showing in its Appellant's brief that these elements have been met. It would be unsuccessful if it tried to do so.

There is no indication that DEC voluntarily or intentionally abandoned recovery of these costs when it sought a PDO in 2007. To the contrary, the order in the 2011 case provided, "[f]or ratemaking purposes, the issuance of this order does not constitute approval of the reasonableness or prudence of specific project development activities or recoverability of specific items of costs[.]" PSC Order 2011-454 at 17. Consistent with that order, DEC did not seek any recovery for the Lee Site until this case. The amount of recovery sought was not a surprise because DEC had been regularly reporting its costs, including AFUDC, since 2011.

DEC is not seeking a double recovery of any of these costs. It has not recovered any of the requested costs to date. DEC has never indicated that it would not seek recovery of these costs or that its recovery would be limited to that provided by the BLRA. DEC has not taken any inconsistent positions before the PSC, nor has it concealed any material facts in any proceedings given the permissive language of the BLRA. There is no evidence that any party was misled or changed its position based on DEC's previous filings under the BLRA. Instead, DEC relied on the permissive language of the BLRA and PSC precedent in not seeking additional pre-

authorizations in the period leading up to the abandonment of the project. Therefore, there is no basis for applying the equitable concepts of waiver and/or estoppel in this case.

CONCLUSION

For these reasons, the Commission's decision to allow the recovery of preconstruction costs associated with the Lee Site must be affirmed.

Respectfully submitted,

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